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U.S. Citizenship
and Immigration
Services

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FILE:  Office: CALIFORNIA SERVICE CENTER Date: **OCT 23 2008**

IN RE: Applicant: 

APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

ON BEHALF OF APPLICANT:


INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.



Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who entered the United States without a lawful admission or parole on or about August 25, 1989. On July 26, 1993, the applicant filed a Request for Asylum in the United States (Form I-589) with the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)). On April 28, 1994, the applicant was interviewed for asylum status. On September 19, 1994, his application was denied and on the same date an Order to Show Cause (OSC) for a deportation hearing before an immigration judge was issued. On February 21, 1995, the applicant failed to appear for the deportation hearing and he was subsequently ordered deported *in absentia* by an immigration judge, pursuant to section 241(a)(1)(B) of the Immigration and Nationality Act (the Act) for having entered the United States without inspection. On February 14, 1996, a Warrant of Removal/Deportation (Form I-205) was issued, and a Notice to Deportable Alien (Form I-166) was forwarded to the applicant requesting that he appear at the Los Angeles, California District Office in order to be removed from the United States. The applicant failed to surrender for deportation or depart from the United States. The applicant is the beneficiary of a Petition for Alien Relative (Form I-130) filed by his U.S. citizen spouse. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). He seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. 1182(a)(9)(A)(iii), in order to remain in the United States and reside with his U.S. citizen spouse and children.

The Director determined that the unfavorable factors in the applicant's case outweighed the favorable ones, and denied the Form I-212 accordingly. See *Director's Decision* dated October 5, 2005.

Section 212(a)(9)(A) of the Act states in pertinent part:

(A) Certain aliens previously removed.-

. . .

(ii) Other aliens.- Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General [now Secretary, Homeland Security, "Secretary"] has consented to the alien's reapplying for admission.

A review of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) amendments to the Act and prior statutes and case law regarding permission to reapply for admission, reflects that Congress has; (1) increased the bar to admissibility and the waiting period from 5 to 10 years in most instances and to 20 years for others; (2) has added a bar to admissibility for aliens who are unlawfully present in the United States; (3) has imposed a permanent bar to admission for aliens who have been ordered removed and who subsequently enter or attempt to enter the United States without being lawfully admitted. It is concluded that Congress has placed a high priority on deterring aliens from overstaying their authorized period of stay and/or from being present in the United States without a lawful admission or parole.

On appeal, counsel submits a brief and copies of documentation submitted with the filing of the Form I-212. In his brief, counsel states that the Director did not take into account relevant case law used by the Board of Immigration Appeals (BIA) and the U.S. Citizenship and Immigration Services (USCIS) in determining whether hardship exists in adjudicating an I-212 waiver. Counsel alleges that the Director did not look into BIA decisions wherein they give guidance on hardship, but instead based his decision on case law from different circuits. Counsel states that if the Form I-212 is not granted, the applicant will be forced to return to Mexico where he has not lived since his arrival in the United States in 1989, and he will not be able to find employment to support his family. In addition, counsel states that the applicant does not have a criminal record and the only unfavorable factors are his illegal entry, his unlawful presence and the fact that he did not leave after receiving a deportation order. Counsel states that the applicant did not leave because at the time he had two U.S. citizen children who depended on him. Additionally, counsel states that the applicant is now married to a U.S. citizen, has five U.S. citizen children, two from a previous relationship, who will lose his economic and emotional support. According to counsel, the applicant deserves a favorable decision on his Form I-212 because of his family ties in the United States and because he is a responsible father and employee who has demonstrated that he is a law abiding and contributing member of society. Furthermore, counsel asserts that the applicant's family depends on his income and if the Form I-212 is denied they will not be able to meet their monthly economic obligations. Counsel further refers to the decision in *Salcido-Salcido v. INS*, 138 F.3d 1292(9th Cir. 1998), which states that separation from family may be the most important single hardship factor. Counsel alleges that if the applicant is not permitted to remain in the United States, his wife and children would lose the opportunity to spend quality time with him and it would be more detrimental to his children who are accustomed to his presence. Moreover, refusing admission to the applicant would negatively impact the children's school performance. If the applicant were denied admission his family would have to choose between relocating to Mexico and remaining in the United States. If they decide to remain in the United States they would have to cope with loss of their father and if they move to Mexico they would have to adapt to a new school environment and all the challenges that go along with moving to a foreign country. Finally, counsel states that the applicant is a father and husband who has been rehabilitated and requests that the Form I-212 be granted so that his family will not suffer extreme hardship. In her brief, counsel refers to case law regarding extreme hardship in an effort to show that the applicant's family would suffer extreme hardship.

In her brief, counsel does not specify which case law the Director used that is outside of the circuit where the applicant resides. The AAO notes that although the applicant in the present case resided within the jurisdiction of the Ninth Circuit Court of Appeals, the published decisions of the other Circuits are considered persuasive evidence regarding issues not directly decided by the Ninth Circuit. Therefore, the AAO finds that the Director properly used case law from other Circuits.

Salcido-Salcido, supra, as well as other case law referred to by counsel dealt with suspension of deportation where extreme hardship is taken into consideration. Unlike sections 212(g), (h), and (i) of the Act (which relate to waivers of inadmissibility for prospective immigrants), section 212(a)(9)(A)(iii) of the Act does not specify hardship threshold requirements which must be met. An applicant for permission to reapply for admission into the United States after deportation or removal need not establish that a particular level of hardship would result to a qualifying family member if the application were denied. The AAO will consider the hardship to the applicant's spouse and children, but it will be just one of the determining factors.

U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. See *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996). U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation. *Hassan v. INS, supra*, held further that the uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported. Moreover, the U.S. Supreme Court held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

In *Matter of Tin*, 14 I&N Dec. 371 (Reg. Comm. 1973), the Regional Commissioner listed the following factors to be considered in the adjudication of a Form I-212 Application for Permission to Reapply After Deportation:

The basis for deportation; recency of deportation; length of residence in the United States; applicant's moral character; his respect for law and order; evidence of reformation and rehabilitation; family responsibilities; any inadmissibility under other sections of law; hardship involved to himself and others; and the need for his services in the United States.

In *Tin*, the Regional Commissioner noted that the applicant had gained an equity (job experience) while being unlawfully present in the U.S. The Regional Commissioner then stated that the alien had obtained an advantage over aliens seeking visa issuance abroad or who abide by the terms of their admission while in this country, and he concluded that approval of an application for permission to reapply for admission would be a condonation of the alien's acts and could encourage others to enter without being admitted and work in the United States unlawfully. *Id.*

The court held in *Garcia-Lopes v. INS*, 923 F.2d 72 (7th Cir. 1991), that less weight is given to equities acquired after a deportation order has been entered. Further, the equity of a marriage and the weight given to any hardship to the spouse is diminished if the parties married after the commencement of deportation proceedings, with knowledge that the alien might be deported. It is also noted that the Ninth Circuit Court of Appeals, in *Carnalla-Nunoz v. INS*, 627 F.2d 1004 (9th Cir. 1980), held that an after-acquired equity, referred to as an after-acquired family tie in *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998) need not be accorded great weight by the district director in considering discretionary weight. Moreover, in *Ghassan v. INS*, 972 F.2d 631, 634-35 (5th Cir. 1992), the Fifth Circuit Court of Appeals held that giving diminished weight to hardship faced by a spouse who entered into a marriage with knowledge of the alien's possible deportation was proper.

The applicant in the present matter married his U.S. citizen spouse on September 23, 1994, shortly after he was placed in deportation proceedings. The applicant's spouse should reasonably have been aware at the time of their marriage of the applicant's immigration violations and the possibility of his being removed. He now seeks relief based on that after-acquired equity. Therefore, hardship to his spouse will not be accorded great weight.

The AAO finds that the favorable factors in this case are the applicant's family ties in the United States, his U.S. citizen spouse and children, the prospect of general hardship to his family and the absence of any criminal record.

The AAO finds that the unfavorable factors in this case include the applicant's illegal entry into the United States, his failure to appear for deportation proceedings, his failure to appear for removal after receiving a Form I-166, his periods of unauthorized employment and his lengthy presence in the United States without authorization. The Commissioner stated in *Matter of Lee, supra*, that residence in the United States could be considered a positive factor only where that residence is pursuant to a legal admission or adjustment of status as a permanent resident. To reward a person for remaining in the United States in violation of law would seriously threaten the structure of all laws pertaining to immigration.

The applicant's actions in this matter cannot be condoned. His equity, marriage to a U.S. citizen, gained after he was placed in deportation proceedings can be given only minimal weight. The applicant has not established by supporting evidence that the favorable factors outweigh the unfavorable ones.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish eligibility for the benefit sought. After a careful review of the record, it is concluded that the applicant has failed to establish that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.